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Smart Growth: Finding Mediation Tools for Regional Land Use Disputes

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Abstract: Land use oriented border wars occur all over the United States, especially in areas with concentrated populations such as Westchester County. Many of these disputes arise out of local land use control, which usually fails to address regional issues, instead opting to act only in their individual municipal interests. This article describes several possible solutions involving federal, state, regional, and intermunicipal remedies as well as non-governmental solutions such as land use mediation services, to help create regional answers to regional issues.

The “First Concerns” of Local Land Use Power

A real injury for which there is no legal remedy is referred to by courts as *damnum sine injuriâ*. This is a difficult doctrine to explain to first year law students. When it arises in a real dispute between communities regarding an imposing land use project about to be approved in one municipality, the citizens of the neighboring municipality are equally baffled. The law instructs them that they have a limited voice in the decision and that their concerns about its real impacts on them are secondary to those of the approving jurisdiction.

In my last column, I described seven serious border disputes in Westchester County that have arisen out of local decisions to approve a controversial development project with direct impacts on one or more neighboring communities. These involve multi-family housing and assisted-living projects as well as Home Depot, IKEA, Target, and other big-box retail outlets proposed for construction on or near the border of an adjacent community. In that discussion, I referenced Bedford v. Mount Kisco, 33 N.Y.2d 178 (1973) where Bedford complained that the rezoning from single-family to multi-family use of a parcel bounded on three sides by the town would have an undue impact on the town. The Court of Appeals found for Mount Kisco noting that “the [village] Board of Trustees considered the welfare and economic stability of Mount Kisco as its first concern.... Bedford understandably differed from the conclusion reached, but that difference must be regarded as the necessary result of conflicting zoning policies that are confronted at the edge of every municipality.”

A year before the Bedford case, the Court of Appeals had taken a remarkably strong position regarding the need for regional mechanisms to make sense out of

“insular” land use decisions. In Golden v. Town of Ramapo, 30 N.Y 2d 359 (1972), the court stated that “only at the regional level can the pitfall of idiosyncratic municipal action be avoided.” The court called for a system of “state-wide or regional control of land use planning” to “insure that interests broader than that of the municipality underlie various land use policies.” It went on to say that “zoning enabling legislation is burdened by the largely antiquated notion which deigns that the regulation of land use and development is uniquely a function of local government....” It found that this system suffers from “pronounced insularism” and that “questions of broader public interest have commonly been ignored” by it.

Bedford v. Mount Kisco represents the settled judicial doctrine that the state courts will not serve as the mediating mechanism for these border disputes in the ordinary circumstance. This is compounded by the fact that, in the thirty years since Golden was decided, the state legislature has failed to develop a reliable mechanism for preventing or sorting out these disputes among neighbors. This is unfortunate news for Bedford and the other municipalities that are struggling to contain the external impacts of projects on their borders. This raises an obvious question: Are the impacted communities truly without a remedy for a real and substantial injury? What other paths for reconciliation of one community's first concerns and another's negative impact are there in the law?

State remedies

No lesser lights than Cardozo and Pound have illuminated this matter. Both wrote concurring opinions in Adler v. Deegan 251 N.Y. 467 (1929) which upheld special state legislation that stripped New York City of its independent authority to enact legislation governing health and safety conditions in multifamily buildings. Reflecting on the independent authority of a municipality to enact zoning provisions to control population density and traffic, Cardozo stated that interference with the authority to control these matters would be an “intrusion upon a concern or interest of the city, without a compensating offset in the advancement of a concern or interest of the state. So, at least, we may assume until something of the kind is threatened. It has not been threatened yet.” Pound cautioned, however, that the home rule provision of the constitution “did not create a multitude of city states, self-governing in all respects.” He noted that the legislature may, by general law, act in its own way on matters of state concern.

Subsequent case law makes it clear that the state legislature may impose a solution where land use matters rise to the level of state concern. The legislature preempted local zoning when it adopted the Adirondacks Park Agency Act. The Court of Appeals ruled against municipalities that argued that this statute violated their constitutionally-protected home rule prerogatives. The Court noted in Wambat Realty Corp. v. New York, 393 N.Y. S.2d 949 (1977): “[o]f course, the Agency Act prevents localities within the Adirondack Park from freely exercising their zoning and planning powers. That indeed is its purpose and effect, not because the motive is to impair home rule but because the motive is to serve a supervening State concern transcending local

interests.” The question is whether, in the 72 years since the Adler case, the external impacts of the land use decisions of our increasingly crowded suburban communities rise to the level of a state concern, as did the protection of the Adirondacks, justifying state intervention. The further question is whether, given this judicial encouragement, it is politically realistic for the state legislature to consider corrective legislation.

Illustrative of the solutions the state could consider are two bills pending in New Jersey. A. 850 would allow county planning boards to identify “areas of intermunicipal impact.” As part of the process established for land use approvals in such areas, certain development applications would be reviewed by an intermunicipal review board set up to represent the affected communities and the county. The review board would be empowered to grant both municipal and county approvals. A. 414 would affect development proposals on five acres or more that are within 1000 feet of a municipal border. An intermunicipal board would be created which would issue guidelines to define what an intermunicipal concern is and then it would be charged with granting approvals to qualifying projects.

Federal remedies

Since the early 1970’s, there has been no comprehensive effort at the federal level to create mechanisms capable of mediating local land use disputes. In 1973 the National Land Use Policy Act was defeated by a narrow margin. The Act would have provided for a framework of federal, state, regional and local land use plans that would, through their consistency, have discouraged border wars and other unpredictable external impacts of development decisions. Since that time, it has been a political truism that federal environmental laws and other statutes should not and do not affect the prerogative of the state legislature to determine how land use decisions are to be made in the 50 states.

The federal courts have provided little assistance to the aggrieved municipal neighbor involved in a border dispute. This was made clear in recent litigation between New Rochelle and the Town of Mamaroneck regarding the possible approval of a large IKEA store on the town border and a local law adopted by the town attempting to secure extra-jurisdictional permit approval over the New Rochelle project. The U.S. District Court was asked whether the town law stifles competition and is discriminatory regarding business interests beyond the town’s borders. It held that federal court jurisdiction is normally limited to cases that discriminate against out-of state interests or have an incidental effect on interstate commerce, not present in the situation at bar. City of New Rochelle v. Town of Mamaroneck, 111 F.Supp.2d 353.

New Rochelle’s due process and equal protection claims were set aside because the District Court determined that Fourteenth Amendment protections are not “limitations on the internal political organization of the state.” The effect of this is that municipalities may not invoke Fourteenth Amendment claims against their own state or its subdivisions. Similarly, the district court held that the city may not bring a suit under 28 U.S.C. § 1983, joining the Fifth, Seventh, an Eleventh circuits in holding that

governmental subdivisions may not sue other governmental subdivisions under a civil rights statute designed to “provide private citizens with a remedy against state action.” This leaves the parties with their claims under state law which were remanded to the state courts to decide. In an interesting response to Pound and Cardozo, the district court found that “[t]he relationship between [municipal] entities is a matter of state concern.”

Regional remedies

As noted above, if the external impacts of local land use decisions are serious enough to give rise to a state concern, the state legislature can provide regional solutions to the problem of border wars. Since 1971, environmental and land use study commissions, courts, and commentators have bemoaned the parochial effect of local land use decisions and their tendency to exclude affordable housing and to shift environmental impacts to nearby communities. These effects gave rise to what became known as the quiet revolution in land use control. The “revolution” comprised state legislative efforts to adopt growth management legislation, establish regional land use planning agencies, and tether local decisions to state-adopted land use principles or plans. (U.S. Council on Env'tl. Quality, 1971)

It is an oversimplification, but is nonetheless an accurate description, to say that this movement has been more quiet than it has a revolution. Such efforts have met several obstacles including the resiliency of localism in state politics, the inapplicability of state-wide prescriptions to the great diversity of local situations, and the growing unpopularity of end-state planning on which hopes for predictable, rational, and equitable solutions were pinned. The earlier exuberant call for state-wide or regional solutions has become a more muted invitation to local governments to join regional networks and intermunicipal coalitions. In these new networks local officials are encouraged to develop mutually acceptable solutions to land use matters and to hold one another accountable for what are admittedly shared problems.

Intermunicipal remedies

The state legislature has given localities the authority to tailor border war resolution mechanisms to their own circumstances. It has empowered local governments to enter into intermunicipal agreements that arbitrate intermunicipal interests and establish collaborative implementation strategies, specifically in the zoning, planning, and land use arena. The state legislature has adopted statutes making it clear that local governments have ample authority to create intermunicipal planning boards, adopt consistent comprehensive plans and land use regulations, and create joint programs for land use administration and enforcement. (N.Y. GEN. CITY LAW § 20-g, N.Y. TOWN LAW § 284, and N.Y. VILLAGE LAW §7-741). Using this authority some municipalities are entering into intermunicipal agreements to create consistent comprehensive plans and land use regulations that create a basis for discussions about intermunicipal impacts. With regard to particular projects, communities have formed joint planning boards

to approve projects and joint lead agencies to review the environmental impacts of development proposals.

Land Use Mediation Service

This nascent effort to create a mediation mechanism from the ground up could be furthered by a municipal initiative at the county level to create a Land Use Mediation Service. Participating municipalities could adopt resolutions pledging to cooperate in the creation of a mediation service and to refer high-impact development proposals to that service. Mediation has been used to resolve land use disputes with increasing frequency in recent years. According to a recent study by the Consensus Building Institute and the Lincoln Land Institute, the participants in mediated land use disputes throughout the United States report an 84% satisfaction rate with their experience. There is no reason that localities involved in potential intermunicipal disputes over land use matters could not be equally satisfied by the results of mediation services provided by an agency of their own creation.

New York's legislature could continue its laudable pattern of enacting specific enabling legislation in this area by adopting a statute that provides for the creation of a land use mediation service. The legislation could encourage municipalities in one or more counties to create and fund a joint agency to provide such services and for that agency to issue guidelines for the referral of development proposals to it. This would respond to those baffled by their fruitless search for a remedy for the very real injuries they experience as a result of their neighbor's land use decisions.